JD–87–01
Manhattan, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STARCON, INC.

and Case 13–CA–32719

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND HELPERS,
AFL-CIO

*Paul Hitterman* and *Richard Kelliher-Paz,*
*Esqs.,* for the General Counsel.
*J. Roy Weathersby and Mark Keenan Esqs.,*
*(Littler, Mendelson, Fastiff, Tichy & Mathiason),*
of Atlanta, Georgia, for Respondent.
*Michael T. Manley (Blake & Uhlig P.A.),*
of Kansas City, Kansas, for the Union.

SUPPLEMENTAL DECISION

Statement of the Case

**WILLIAM G. KOCOL**, Administrative Law Judge. On June 13, 1997, the Board issued its decision in this case, finding that Respondent violated Section 8(a)(3) and (1) of the Act. *Starcon, Inc.,* 323 NLRB 977 (1997). On May 4, 1999, the United States Court of Appeals for the Seventh Circuit issued its decision enforcing in part and denying enforcement in part of the Board's Order. The Court returned the case to the Board for the entry of a new order consistent with the principles laid down in the Court's decision. *Starcon, Inc. v. NLRB,* 176 F.3d 948 (1999). On June 7, 2000, the Board issued an order remanding the case to an administrative law judge. The Board accepted the Court's opinion as the law of the case. It also instructed that this case be considered in light of *FES (A Division of Thermo Power),* 331 NLRB No. 20 (2000), "including, if necessary, reopening the record to obtain evidence required to decide these issues under the *FES* framework."

On July 6, 2000, Respondent filed a motion for reconsideration of the Board's June 7 Order. Respondent contended that a remand for the purpose of reopening the record was improper under the Court's decision and that the framework set forth in *FES* was not consistent with the law of the case. On October 25, 2000, the Board denied Respondent's motion for reconsideration.

On February 26, 2001, pursuant to my request, the General Counsel filed a motion to further amend the complaint in this case. On March 12, 2001, also pursuant

to my request, Respondent filed a response to the General Counsel's motion. Respondent's response, among other things, addressed the allegations made by the General Counsel in the motion to amend.[1] On March 20, 2001, I granted the General Counsel's motion and gave the parties until April 3, 2001, to notify me if they wished to present additional evidence in this proceeding. No party has expressed a desire to submit additional evidence.

On the entire record[2] and after considering the briefs filed by the General Counsel, Respondent, and the Union I make the following

## Findings of Fact

## I. The Prior Proceedings

### *A. The Board Decision*

Respondent performs maintenance and repair work on petrochemical refineries. It has a complement of employees that it uses throughout the year. Some of the work that Respondent performs is "turnaround" work. This occurs when a refinery shuts down for a period of time while repair work is done. Turnaround work is done 24 hours a day and Respondent's need for employees rises dramatically as a consequence. These additional employees are hired on a temporary basis.[3]

On June 13, 1997, the Board adopted the decision of Administrative Law Judge Robert T. Wallace. By doing so the Board concluded that Respondent violated Section 8(a)(3) by refusing to hire and consider for hire 80 applicants who submitted their applications by mail and at least 32 applicants who personally submitted their applications. The Board found that Respondent had hired 18 permanent employees during the time in question. The Board concluded that Respondent also violated Section 8(a)(3) by subcontracting work to another employer, B E & K, to avoid hiring union members; it concluded that Respondent used an unspecified number of B E & K's employees to perform turnaround work for Uno-Ven, a customer of Respondent. To remedy the violations, the Board ordered that Respondent consider for hire all the union job applicants and hire them all. Respondent was ordered to make all the discriminatees whole for lost wages and benefits. Importantly, the Board ordered that:

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[1] As Respondent accurately points out in the response, I had earlier conducted a conference call with the parties for the purpose of determining whether to schedule a new evidentiary hearing. Although all parties disclaimed the need for such a hearing, I concluded that to assure that all parties made fully informed decisions as to whether they desired to present additional evidence I would require the General Counsel to file an amended complaint to conform with the Board's remand order and require that Respondent file an answer.

[2] GC Exhs. 40 through 56, which are the formal papers, are received in evidence.

[3] The facts in this case have been set forth extensively in prior decisions. They will be repeated here only to the extent necessary to resolve pending issues.

> Questions concerning the number of jobs (regular and temporary) that would have been available during the period of discriminatory conduct and use of remedial preferential hire lists are reserved for determination in the compliance phase of this proceeding. [Footnote omitted.] [323 NLRB at 983.]

The Board also concluded that Respondent violated Section 8(a)(3) by changing its application and hiring policies to avoid hiring union supporters.[4] No affirmative relief was ordered for this violation.

### *B. The Court's Decision*

The Court affirmed the Board's conclusions that Respondent had violated the Act. However, the Court disagreed with the Board's conclusion that Respondent was required to hire and pay backpay to all the discriminatees where there were not enough job openings for all of them. The Court concluded that this matter could not be postponed for resolution in compliance proceedings because the fact that there were fewer openings than applicants was a defense to the allegations that Respondent had failed to hired all of the applicants. The Court held:

> If [the] . . . Board wants to order relief to particular "salters," [it has,] at a minimum, [to] determine how many of them [Respondent] would have hired had it not been actuated by hostility to unionization. [176 F.3d 948].

The Court returned the case to the Board for the entry of a new order consistent with the principles set forth in its opinion.

### *C. The FES Decision*

On May 11, 2000, after the Court's opinion in this case, the Board issued its decision in *FES.* In that case the Board directly addressed the concerns raised by the Court in this case as well as by other Courts of Appeals. The Board revised the standards it uses in cases such as this case, involving allegations of refusal to hire applicants and refusal to consider them for hire. The Board held that to establish a violation in these cases the General Counsel must show: (1) that the respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the respondent has not adhered uniformly to such announced requirements, or that the requirements were

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[4] The Board also found that Respondent violated Sec. 8(a)(1) by creating the impression that an employee's union activity would be kept under surveillance, threatening employees that union members would not be hired, and that it would subcontract work to avoid hiring union members, and violated Sec. 8(a)(3) by issuing written warnings to two employees and suspending one of those employee. These findings are not at issue in this proceeding

themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden then shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity. The Board held that it was the respondent's burden to show that an applicant did not meet its specific criteria for the position, was otherwise unqualified for the position, or was not as qualified as those who were hired.

Importantly, the Board indicated its agreement with the approach taken by the Court in this case. Thus, the Board concluded that it is the General Counsel's burden to show at the hearing on the merits the number of openings that were available. The Board left for compliance proceedings the issue of which particular discriminatees were entitled to be hired and receive backpay.

## II. Refusal to Hire Allegations

### *A. Background*

As previously indicated, on February 26, 2001, the General Counsel amended the complaint. The amendment alleges that in April and continuing through May 1994,[5] Respondent solicited applicants for welding, mechanic, and laborer positions by distributing leaflets and placing advertisements. It alleges that the requirements for hire set forth in the leaflets and advertisements were not uniformly adhered to by Respondent and were pretextual and used as a pretext for discrimination. The amendment further alleges that on June 22, the Union submitted 80 job applications to Respondent and thereafter 30 more persons applied for the positions with Respondent. The amendment alleges that all these applicants met Respondent's generally stated requirements for the positions that it was seeking to fill and that they were available for employment "at all times material." The amendment further alleges that between July 4 and September 30, Respondent hired 27 (sic) employees and hired additional employees to work on specified projects from July 17 to December 4.

On March 12, 2001, Respondent filed an answer to the amendment that denied the essential allegations in the amendment. The answer also pled a number of affirmative defenses.[6]

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[5] All dates are in 1994 unless otherwise indicated.

[6] Respondent also argues that the General Counsel's amendment is improper under Secs. 102.15 and 102.17 of the Board's Rules and Regulations. This argument is frivolous. Those rules specifically provide that the judge designated to conduct the hearing may, upon motion by the General Counsel, allow an amendment to the complaint. Because this case has been reopened, I have authority to allow amendments to the complaint.

## B. Analysis

### 1. Number of discriminatees

I find it necessary to first identify more precisely the number of discriminatees. Judge Wallace ordered Respondent to offer employment to the 111 persons listed on Appendix A to the complaint. That list included the name of Joe Nelson, but I have been unable to locate an application with that name, and the General Counsel now contends that the number of applicants is 110. I shall therefore not count him as a discriminatee. The parties agree that on June 22, 80 identified applications for employment were made, but they disagree as to the numbers that were made thereafter. On July 19, Robert Behrends and Kenneth Lusk applied for work, bringing the total to 82. On July 25, 28 employees applied for work at Respondent facility. That same day Brian Geiger and Matt Grammer applied for work with Respondent at another facility bringing the total to 112 applicants. These numbers are consistent with those found by Judge Wallace.[7] The Court in its opinion and the Board in its remand order refer to 80 applicants; as set forth above that number is obviously an inadvertent error.

However, these numbers include Michael Eugene Forkin who applied twice – on June 22 and July 25. They also include Wayne Darby, who applied on July 25. Respondent called him on July 27 and hired him the next day with knowledge of his union activities. The General Counsel concedes that Darby should not be in the pool of discriminatees entitled consideration for instatement and backpay. This reduces the number to 110, as alleged by the General Counsel.

The numbers also include Robert Lieske, Ernest Grossman, and Donald Lieske. They also applied on July 25. On July 27, Respondent offered Robert Lieske a position, but he declined because he had obtained another job. Respondent attempted to offer Grossman a position, but Grossman did not respond to a voice mail message. Respondent intended to offer Donald Lieske a position on July 27 also, but he did not respond to three telephone calls made to him. Although, as more fully discussed below, the General Counsel has established that Respondent hired a substantial number of employees for the week ending July 31 and thereafter, the General Counsel has not shown that Respondent would have considered these three alleged discriminates again for employment under circumstances where they already had refused or otherwise rebuffed Respondent's effort to hire them and were they gave no indication of a desire to be considered again for future vacancies. I conclude that the General Counsel has failed to show that Respondent unlawfully failed to hire these three employees. This result is consistent with the position taken by the General Counsel regarding Wayne Darby, who also was offered employment. Thus, the number of discriminatees entitled

[7] *Starcon, supra,* at 978 (80 applicants), 979 (Behrens and Lusk and about 30 applicants on July 25), and 982 (at least 32 applicants between July 19 and 27 (sic)). Judge Wallace later refers to "39" applicants who applied between July 19 and 25 and then later makes reference to "37" who made application during that time period. I conclude that these latter references are inadvertent errors.

to consideration for instatement and backpay is 107.

2. Number of positions available

Both the Court opinion and *FES* require that I determine the number of positions that were available for the discriminatees. The record shows that from July 4 through September 30, Respondent hired one full-time laborer on July 19; two on July 28 and August 9; and two on August 11 for a total of six.[8] During that same time period Respondent hired full-time welders on July 4, 21, and 29, August 3 and 9, for a total of five. Respondent also hired three full-time mechanics on July 25, and one on August 5, and 23, and September 8, for a total of six. Respondent thus hired 17 full-time employees during that time period.

Beginning the week ending July 17 through December 4, Respondent used a number of temporary employees on three projects. The number of temporary employees working on the Uno-Ven project peaked at 39 for the week ending August 7. The number of employees working on the Mobil project peaked at 16 for the week ending October 2. Finally, four employees worked on the Marathon project for the week ending December 4. All of these employees were hired as welders or mechanics. I conclude that a total of 59 temporary positions were available during this time period.

Citing *Eckert Fire Protection,* 332 NLRB No. 18 (2000), Respondent argues that the number of positions for which it would have considered the discriminatees is reduced because it would not have considered the applications active after certain time periods. The applications forms completed by the first set of 80 discriminatees read:

> This application for employment shall be considered active for a period of time not to exceed 45 days. Any applicant wishing to be considered for employment beyond this time period should inquire as to whether or not applications are being accepted at that time [GC Exh. 15].

Thereafter, Respondent used a revised application form that contained this identical language, except that the time limit was increased to 60 days. In addressing the General Counsel's burden for a refusal to consider violation in subsequent compliance proceedings the Board in *FES* stated:

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[8] As previously indicated, Respondent also hired Wayne Darby as a laborer on August 1. As more fully described in Judge Wallace's decision, Respondent hired Darby with knowledge of his support for the Union. The General Counsel concedes that Darby's position should not be counted as available for the discriminatees. On July 29, Respondent hired Millard Howell as a welder. Judge Wallace concluded that Howell was thereafter subjected to unlawful discipline. However, Respondent was unaware of Howell's union sentiments at the time he was hired. I conclude that Respondent hired Howell as part of its unlawful scheme to avoid hiring known union adherents and that Howell's position should therefore be counted as available for the discriminatees.

> Since the General Counsel is seeking to prove only the consequence of the refusal-to-consider violation – not a new discrimination violation – proof of animus is not part of his case in compliance. However, because there has not been a showing in the hearing on the merits with respect to the hiring decision on the subsequent job opening . . . the General Counsel must prove that the discriminatees actually would have been selected . . . and that entails, at a minimum, *showing that the applications filed at the time discriminatees applied would still be regarded as active when the openings occurred . . .* [Emphasis added]. [*FES,* id., slip op. at 7 fn. 18].

It seems that this same standard should also apply to the hearing on the merits.

In reference to this issue, Judge Wallace found that an agent of Respondent testified that Respondent had followed a strategy of building up a reserve of applications for long-term hiring needs and that prior to the receipt of the 80 applications on June 27 Respondent had informal application procedures designed to produce a backlog of applications as a hedge against unforeseen needs. In other words, Judge Wallace concluded that the General Counsel had established that Respondent did not adhere to the 45-day time limit indicated on the application forms. Judge Wallace also concluded that the changes that Respondent made thereafter in its hiring procedures were unlawful. The Board and Court affirmed these conclusions. It is thus clear that Respondent's argument has been previously considered and rejected and may not now be relitigated.

3. Qualifications of the applicants

*FES* holds that it is the General Counsel's burden to show that the applicants had the experience or training relevant to the announced or generally known requirements of the available positions. This holding is entirely consistent with the Court's opinion. The General Counsel may also show that the requirements themselves were prextextual or not uniformly followed. The General Counsel makes that argument in this case, pointing to evidence that Respondent's agent, Bentley Hatteberg, told an applicant that the hiring process was all just a bunch of red tape. This statement is too general to show that the announced *requirements* for the positions were either not followed or were pretextual. The General Counsel also points to a statement made by another agent to the same applicant that the only way to get a job with Respondent was to get a recommendation from the supervisor because Respondent was concerned about the union supporters who had been applying for work. This statement may show animus, but is fails to show that the announced requirements for the positions were pretexts. I conclude that the General Counsel has failed to show that the requirements for the positions were either not followed or were pretextual.

Under these circumstances, *FES* requires that the General Counsel show that the applicants had the experience or training for the announced or generally known requirements for the available positions. The General Counsel's burden in this regard is limited to showing that the applicants met the objective and quantifiable facial

requirements for the positions. It is Respondent's burden to show that the applicants failed to satisfy any subjective, nonquantifiable requirements for the positions.

As more fully described in Judge Wallace's decision, Respondent advertised for the positions of welder, mechanic, and laborer. Welders were required to pass a 2-inch pipe-welding test administered by a third party on Respondent's behalf. None of the discriminatees were allowed the opportunity to take the test as a result of Respondent's unlawful refusal to consider them for employment. Respondent also indicated that prior pipeline or petro-chemical experience "is helpful" for the welder's position. Respondent indicated that mechanics "[m]ust have a working knowledge of piping, heat exchangers, above-ground tanks, and refinery turnarounds." Respondent wanted laborers to be "[a]ny hard-working individual ready and willing to learn how to work in the petro-chemical industry . . . " [323 NLRB at 978].

The General Counsel argues that the requirements for these positions contain no objective criteria and therefore he bears no burden of showing that the applicants met those requirements. Instead, argues the General Counsel, Respondent bears the burden of showing that the applicants did not meet those requirements. I disagree. I conclude that the requirements contain both objective and subjective elements.

Turning first to the welder position, I conclude that the General Counsel bears the burden of showing that the discriminatees had the experience or training to perform welding work in general. To hold otherwise would mean that the General Counsel's burden is simply to show that the alleged discriminatee applied for the position regardless of whether or not, for example, the alleged discriminatee has spent her entire working career as a singer or diplomat (or was a penguin, to use Judge Posner's description) without any experience or training as a welder. I do not read *FES* as placing such an empty burden on the General Counsel. Moreover, the General Counsel's argument is inconsistent with the rationale of *FES* that the burden of establishing the qualifications of the applicants is placed on the party with the superior knowledge of those qualifications – here the discriminatees and the General Counsel. It would also place an unreasonable burden on Respondent.

The statement in the advertisements that prior pipeline or petro-chemical experience "is helpful" is nonquantifiable and therefore it is properly Respondent's burden to show the applicants lacked the experience resulting from the prior pipeline or petro-chemical work. The requirement that the welders pass a 2-inch pipe-welding test requires more analysis. On the one hand, the test appears to be an objective one; as such under *FES* it would be the General Counsel's burden to show that the applicants could pass the test. The problem, however, is that one cannot be sure that the applicants would have passed the test until after it was given. And it was Respondent's unlawful refusal to consider the applicants for employment that prevented them from demonstrating that they could pass the test. Under these circumstances, I conclude that Respondent should be permitted to administer the same pipe-welding test to those discriminatees qualified to fill welder position and be required to hire those applicants only if they pass that test.

Turning next to the mechanic position, Respondent advertised that mechanics must have a working knowledge of piping, heat exchangers, above-ground tanks, and refinery turnarounds. This too has both objective and subjective components. It is clear that Respondent sought not just mechanics in general, but mechanics that had knowledge in the areas listed above. This is objective and therefore is the General Counsel's burden. I thus again reject the General Counsel argument that the stated qualifications for this position are entirely subjective. Whether the knowledge was sufficient to constitute "working knowledge" is subjective. It, therefore, is Respondent's burden to show that the knowledge possessed by the applicants in piping, heat exchangers, above-ground tanks, and refinery turnarounds did not amount to "working" knowledge.

The qualifications for the laborer's position are only that the applicants are able to engage in physical labor. The General Counsel's burden is to show that applicants can do so in general. Respondent's burden then is to show that the individual applicant lacks the ability to perform the specific laborer tasks.

Having allocated the burdens, I turn now to examine the qualifications of the applicants. The General Counsel argues that all applicants were qualified for all three positions. He bases this on the information contained in the discriminatees' application forms. Respondent objects and argues that the statements made in the application forms constitute hearsay and thus may not be considered for the truth of the matters asserted. Respondent is indeed correct that the applications contain hearsay statements. But this misses the point, which is that it was Respondent's practice to consider the applications, notwithstanding their hearsay nature, in making its hiring decisions. Respondent also argues that the General Counsel cannot meet its burden on this issue without calling each discriminatee as a witness. I reject this contention also. The General Counsel may meet his burden using whatever type of admissible evidence he deems appropriate. In a similar vein, Respondent argues that it has been deprived of due process because it was unable to cross-examine the applicants. Here again, however, the point is that Respondent itself relied on the application forms. The General Counsel was not required to call the applicants and thus Respondent was not deprived of any opportunity to cross-examine them.

Turning to the mechanics position, I have indicated that the General Counsel must show that the applicants had the knowledge and experience to perform mechanic's work and had some knowledge in the areas of piping, heat exchangers, above-ground tanks, and refinery turnarounds. The General Counsel does not attempt to identify which of the applicants meet this requirement. Instead, he rests solely on his contention that it is not his burden to do so. Respondent and the Union, however, agree that the applications of the following 16 discriminatees indicated some knowledge of the areas described above: Bernard Sturmer, John Burns, Paul Gurgone, Vincent Urso, Thomas Feeney, Ronald Gould, Philip Ljubicich, William Feeney, Eugene Forkin, Phillip Perkins, W. Zitoun, Philip Davidson, J. Ruby, Jerry Davis, Roger Jensen, and August Tribbett. Based upon my review of their applications, I agree. Respondent concedes that applications of two other discriminatees indicated such knowledge. Kevin Kavanaugh's application indicates that he worked for Clark Oil, and Dolye Sawyer's

application shows that he had experience in oil tank work. I agree with Respondent's concession. The Union argues that the applications of four other discriminatees show the requisite knowledge. The applications of Alton Sanders, James Bragan, and Scott Gould show that they had experience in refineries; I agree with the Union that these three discriminatees have demonstrated the requisite knowledge. The Union also argues that the application of Raymond Lewis demonstrates the necessary knowledge. I disagree and will not count him. My examination of the applications shows that Christopher Preble and James Chavez had knowledge of exchange repairs, Jerry Litherland, Patrick Polick, and Richard Passini had knowledge of tank repair work. I conclude that these applications demonstrated some knowledge in the requisite areas. In sum, the evidence shows that 26 discriminatees met the stated, objective qualifications for the mechanic position.

I turn now to examine whether Respondent has shown that these 26 discriminatees failed to meet the subjective qualifications for the position or that the persons it actually hired had superior qualifications. In this regard, Respondent argues that only two of the discriminatees indicated that they had experience in "refinery turnarounds." This argument must be based on the notion that Respondent required mechanic applicants to have some knowledge in each of the areas specified in the position announcement. But I find no evidence to support that notion and I therefore reject it. Respondent also complains that because the General Counsel never identified which of the discriminatees for whom he was seeking an instatement and backpay remedy it would be required to guess their identities and positions in order to prove their lack of qualifications. That indeed appears to be the case. But that it the burden allocated to Respondent under *FES.* Respondent does not otherwise argue that the applicants were unqualified. Accordingly, I find that there were 26 discriminatees qualified to fill the mechanic positions that became available.

Turning now to the qualifications of the discriminatees to fill the welder positions, I have concluded above that the General Counsel must show that they had the experience or training to perform welding work in general. I have examined each of the applications and conclude that they show that each of the discriminatees possessed the knowledge or training to perform welding work.[9]

I turn to examine whether Respondent has shown that it would not have hired these discriminatees because they failed to meet the subjective requirements of the welding position. Respondent argues that it needed only a particular type of welder – A welders and B welders. In doing so Respondent relies on testimony that was not relied on by Judge Wallace. Judge Wallace explicitly described the qualifications that

[9] I have concluded above that Donald Lieske is not a discriminatee. He should not be considered for this position for another reason. Donald Lieske's application shows that he worked as a laborer or helper at "D-Con Morrison" for a period of about 9 months. It provides no more work history. When asked to describe any specialized training, apprenticeship, skills, job related training, or job related activities, Lieske wrote "All shop classes." I conclude that the General Counsel has failed to show that Donald Lieske had the experience or training to perform welding work.

Respondent set for this position, but he makes no mention of the additional qualifications that Respondent now seeks to add to those listed on the published announcements. I conclude that Judge Wallace necessarily rejected that testimony. To the extent that I am required to make a credibility determination on this matter, I would also reject this testimony because it is inconsistent with the qualifications Respondent published on at least two occasions. It stands out as something contrived after the fact. Finally, even assuming that Respondent was seeking only A and B welders, Respondent has failed in its burden of showing which of the discriminatees lacked the skills or training to perform the work of A or B welders. For all these reasons I reject Respondent's argument. Respondent also argues that it required that welders have some prior petrochemical experience. I reject that argument too; the published qualifications indicated only that such experience would be "helpful." Again Respondent has failed to meet its burden of showing which of the welder applicants lacked the skills or training necessary to perform the work.

Finally, I address the qualifications of the discriminatees for the laborer's position. The General Counsel must show that the discriminatees have the ability, in general, to perform physical labor. Based upon my review off the applications, I conclude that he has done so. All the discriminatees have past experience performing physical work. Respondent has failed to show that these discriminatees are unable to perform the specific task demanded of its laborers. I therefore conclude that all of the discriminatees are qualified to fill the position of laborer.

4. Availability of the applicants

Respondent concedes that under the Board and Court order, discriminatees Eugene Forkin and Robert Behrens may be awarded instatement and backpay; they were the only discriminatees to testify at the trial. Respondent argues that none of the other discriminatees are eligible for such a remedy because the General Counsel has not established that those discriminatees were available for the positions that became open after they had applied. Respondent also argues that the General Counsel has also failed to show that that the discriminatees would have accepted employment had it been offered. In *FES,* the Board, in the context of addressing the remedy for a refusal to consider violation, stated "[T]he General Counsel must prove that the discriminatees actually would have been selected for the opening in questions." *FES,* id., slip op. at 7 fn. 18. It seems to follow that if it were shown that the applicants were unavailable to accept employment or would have declined employment had the offer been made, they would *not* have been selected for the opening in question.

I first consider whether this issue must be addressed as part of the merits or whether it can be deferred to the compliance proceeding. If it is shown that a discriminatee was unavailable to accept employment at the time she should have been offered the position, it seems that there has been no unlawful refusal to hire on that occasion. Likewise, if shown that the discriminatee would not have accepted the offer in any event had it been extended, again there is no unlawful refusal to hire. These are issues going to the merits of the case, and the thrust of both the Court's opinion and *FES* is that issues going to the merits may not be deferred to the compliance stage. This conclusion is buttressed by the Court's statement:

> The worker might have gotten a higher-paying job and thus have no interest in being reinstated and have suffered no loss from the discrimination. There would be no basis for ordering reinstatement and backpay in such a case but the Board would still be entitled to enter a cease and desist order to provide some assurance against a repetition of the violation [176 F. 3d at 951].

In context, I understand this to mean that the Board is precluded from finding a refusal-to-hire violation, or award a refusal to hire remedy, unless it is shown that the discriminatee was available and would have accepted the offer if made, but that the Board could still enter a cease and desist order if there had been a refusal to consider violation. This is the law of the case and must be honored. I therefore conclude that this issue must be addressed now and cannot be deferred.

I next turn to the issue of whether it is the General Counsel's burden to show the applicants remained willing and available to accept the offer of employment or whether it is Respondent's burden to show the lack thereof. Under the facts of this case Respondent has violated the Act by refusing to consider the discriminatees for hire; it is the wrongdoer. This fact might trigger the maxim that doubts and ambiguities should be resolved against it because it was Respondent's unlawful conduct that caused the uncertainty. But the Board in *FES,* again in the context of the remedy for a refusal to consider violation, stated:

> [B]ecause there has been no showing in the hearing on the merits with respect to the hiring decision on the subsequent job opening, issues related to the hiring decision cannot be resolved against respondent as an adjudicated wrongdoer.

*FES,* id., slip op. at 7 fn. 18. The Board has thereby rejected the application of that maxim under these circumstances. As shown above, this matter goes to the merits of the violations, at least in this case. The General Counsel generally bears the burden on such matters. Also, the Board considers which party has easier access to the relevant information in assessing on whom to place a burden. In this instance, it is the General Counsel who has the knowledge in the first instance of whether the discriminatees remained willing and able to accept employment during the time after they made application. A respondent would have little access to this information and, because the Board does not allow discovery, a respondent would likely have to call all the alleged discriminatees as witnesses in order to question them about these issues. This would unnecessarily prolong and delay cases such as this. Finally, as pointed out above, in the amended complaint, the General Counsel himself accepts this burden by alleging that the discriminates were available for work at all material times. Under these circumstances I conclude that the General Counsel must show that the discriminatees remained willing and available to accept the positions he contends should have been offered to them.

Respondent argues that the General Counsel can only meet this burden by presenting the testimony of all the discriminatees. This argument lacks merit. The

General Counsel may meet this burden in any number of ways that do not include calling the applicants to testify. It is for the General Counsel to decide how best to meet his burden. In support of its argument, Respondent cites *B E & K Construction Co.,* 321 NLRB 561, 570 fn. 31. That case is not on point. There, the judge concluded that the applications at issue were not properly authenticated. Here, both the Board and the Court have concluded that the applications were properly received into evidence. Respondent also cites *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 177-178 (1965). However, that case involved a compliance proceeding. It has not been applied to cases on the merits.

Finally, I consider whether it can be presumed that because the discriminatees made application they remained available and willing to accept employment throughout the relevant period. I find such a presumption cannot be supported on the record in this case, I note that Respondent is in the construction industry where employees often move quickly to other jobs. I note that in this case the discriminatees had a history of working in higher-paying union jobs. That does not mean, of course, that they would not have accepted a lower-paying job if they remained out of work. But it does call in question their availability if they, in the interim, found work in a longer duration project at the higher-union wage level. Indeed, the facts in this case undermine such a presumption. It will be recalled that a group of the discriminatees made application on July 25 and 2 days later Respondent began contacting four of the applicants. In that short period of time one discriminatee found other work and declined Respondent's offer and two others displayed their unavailability to accept the offer by failing to return Respondent's calls. It should be kept in mind that the General Counsel seeks reinstatement and backpay for openings that occurred almost 6 months after the discriminatees completed their application. I conclude it cannot be presumed that, from the mere act of application, applicants remains willing and available to accept employment indefinitely. Because the General Counsel has not otherwise shown that the discriminatees remained willing and available to accept employment with Respondent for openings that occurred I shall dismiss the refusal to hire allegations in the complaint, excluding Forkin and Behrens.

5. Refusal to consider allegations

As indicated above, the Board concluded and the Court affirmed that Respondent has unlawfully failed to consider the discriminatees for employment. The Board did not order a remedy specifically designed to address the refusal to consider violation. The Court indicated that the Board was entitled to at least a cease-and-desist order. The Board remanded this case for consideration in light of *FES.* In that case the Board held that the proper remedy for a refusal to consider case includes not only a cease-and-desist order, but also an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in a nondiscriminatory manner. The remedy would also include an order to notify the discriminatees, the Charging Party, and the Regional Director of future openings in positions for which they applied or substantially equivalent positions. The Board leaves to the compliance proceeding the identification of those discriminatees entitled to instatement and backpay.

The General Counsel's brief offers no position on what remedy, if any, he seeks for the refusal to consider violations. The Union, however, argues that the remedies described in *FES* should be applied. Respondent, however, argues that those remedies are inconsistent with the Court's opinion. In particular, Respondent disputes the validity of a Board order that would leave to compliance the entire issue of whether there had been unlawful refusals to hire occurring after the hearing on the merits. I agree.

The Board explained that in the compliance proceeding for a refusal to consider case the General Counsel would have the burden of establishing the general qualifications of the applicants. This is identical to the burden the General Counsel has on the merits. If established, the burden would shift to the respondent to show that it would not have hired the discriminatees. This too is a respondent's burden on the merits. In this regard, the compliance proceeding very much resembles the hearing on the merits. The compliance proceeding contemplated by the Board appears very similar to the one it had applied earlier in refusal to hire cases and that was criticized by the Court. This appears to be a matter that the Court held deals with the issue of liability, a matter "the Board can't shove off to the compliance stage of the proceeding." *Starcon,* id. at 951. Under the law of case, such a remedy may not be entered here. The other aspects of the Board's remedy for a refusal to consider case are not in conflict with the Court's opinion. However, it is now nearly 7 years since the unlawful conduct transpired and those remedies are impracticable as a result of that passage of time.

Amended Remedy

The first sentence in the second paragraph in the Remedy section of the decision is deleted. In its place will be substituted: Among other things, Respondent will be ordered to consider for employment and hire Eugene Forkin and Robert Behrens for which they applied, except that before they are hired for the welding position they must pass the 2-inch welding test that Respondent administered to other welders, and Respondent shall make Forkins and Behrens whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them. Issues outlined in *Dean General Contractors,* 285 NLRB 573 (1987), will be left for resolution in the compliance stage of this proceeding.

Amended Order

1. The following will be added after paragraph 1(e) of the Order:

(f) Refusing to consider applicants for employment because they support the Union or any other labor organization.

Paragraph 1(f) in the original order will be relettered (g).

2. The language in paragraph 2(a) of the order is deleted and the following is substituted: Offer immediate employment to Eugene Forkin and Robert Behrens to positions for which they applied or, if nonexistent, to substantially equivalent positions, and make them whole, with interest, for the loss of earnings and benefits suffered as a

result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

Amended Notice

1. The following will be added to the "WE WILL NOT" portion of the notice: WE WILL NOT refuse to consider applicants for employment because they support the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization.

2. The first paragraph in the "WE WILL" portion of the notice is deleted and the following substituted: WE WILL offer immediate employment to Eugene Forkin and Robert Behrens to positions for which they applied or, if nonexistent, to substantially equivalent positions, and make them whole, with interest, for the loss of earnings and benefits suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

Dated, Washington, D.C. June 27, 2001

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William G. Kocol
Administrative Law Judge